# Exhibit 6

AT&T
08/27/2001

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**PROJECT NO. 20400**

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| **SECTION 271 COMPLIANCE MONITORING OF SOUTHWESTERN BELL TELEPHONE COMPANY OF TEXAS** | § § § § § § § | **BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS** |

**AT&T COMMUNICATIONS OF TEXAS, LP'S INFORMAL COMPLAINT RELATING TO SWBT'S FAILURE TO PAY DAMAGES UNDER THE INTERCONNECTION AGREEMENT**

AT&T Communications of Texas, LP (AT&T) files this informal complaint relating to SWBT's failure to pay damages due and owing under Attachment 17 of the AT&T/SWBT Interconnection Agreement.

**DESCRIPTION OF THE DISPUTE**[1]

On August 14, 2001, SWBT sent a letter to Judges Geiger and Srinivasa, filed in Project No. 20400, informing the Commission that SWBT was withholding payment of liquidated damages to AT&T for acknowledged parity violations under PM 27 that SWBT has reported since April 2001. SWBT purported to invoke Attachment 17, section 7.2 of the T2A as the basis for withholding payment of Tier 1 liquidated damages

[1] The facts, actions of the parties and request for relief are described as well in great detail in a letter from counsel to Cindy Malone, SWBT, dated August 24, 2001. That letter is attached and incorporated herein the same as if fully set forth at length.

otherwise due for these violations. Although SWBT has discussed its concern regarding the application of PM 27 with AT&T at an account team level, SWBT's letter to the Commission was the first written notice AT&T received regarding SWBT's intent to withhold payments due and owing under the Interconnection Agreement

By withholding Tier 1 payments under these circumstances, SWBT has placed itself in breach of the Texas interconnection agreement between SWBT and AT&T, which incorporates Attachment 17 of the T2A. SWBT cannot begin to demonstrate that its recent noncompliance with PM 27 resulted from an act or omission of AT&T ***"in bad faith,"*** which is required in order to excuse Tier 1 payments under section 7.2. Indeed, SWBT's letter carefully avoids any direct assertion that AT&T has acted (or failed to act) in bad faith, and SWBT's own description of AT&T's ordering practices confirm that SWBT has no grounds on which to accuse AT&T of bad faith. This reference to bad faith is to be construed in accordance with Texas law. T2A, General Terms and Conditions § 45.1. The "bad faith" standard provides protection against egregious misconduct by a CLEC. It is a standard that is not easily met, should not lightly be invoked, and has no place here.

In addressing a claim that SWBT had acted in bad faith in construing an interconnection agreement with Premiere Network Services, Inc., a panel of Texas Commission arbitrators observed that "[t]he term 'bad faith' often connotes some evil or fraudulent intent on the part of a party." Docket No. 19879, Arbitration Award at 19 (May 5, 1999). Indeed, those arbitrators concluded that "bad faith" required something more than the absence of good faith. *Id.* at 20. Section 7.2 should be construed to require an act or omission on the part of the CLEC that is fraudulent in nature.

The facts in this case in no way support an accusation that AT&T has acted dishonestly or in breach of any recognized definition of a good faith. On the contrary, SWBT's own description of AT&T's UNE-P ordering practices attributes the timing of AT&T's orders to a legitimate business purpose (utilizing telemarketers) and acknowledges that "it does not matter to SWBT when AT&T submits orders." Further, an analysis of the performance data itself demonstrates that AT&T's ordering practices, far from being in bad faith, are eminently reasonable.

PM 27 reports average installation interval. To avoid distorting the results by including data for CLECs that request provisioning outside of the standard interval, PM 27 is structured to exclude orders submitted by a CLEC that requests provisioning beyond the standard interval (i.e., order submitted before 3:00 p.m. and due date requested is not same day, or order submitted after 3:00 p.m. and due date requested is beyond next business day). **SWBT is excluding almost 90% of AT&T's UNE-P orders before making its PM 27 calculations**. The only exclusion provided under the business rules that would permit SWBT to eliminate such a large number of AT&T orders is the exclusion for orders where the CLEC requests a due date that is beyond the standard interval.) Thus, the performance data indicates that far from dumping orders at the end of the day requesting unreasonable due dates, the preponderance of the orders AT&T submits, regardless of the time submitted, request due dates longer than those we are entitled to request. SWBT's PM 27 parity violations certainly cannot be ascribed to AT&T ordering practices, much less ordering practices that could be considered in bad faith, where the great majority of AT&T's orders are not even included by SWBT in calculating PM 27 results.

Section 7.2 only relieves SWBT's obligation to pay sanctions when the noncompliance results from a CLEC act or omission "in bad faith." Because bad faith cannot be shown here, there is no basis for SWBT to withhold Tier 1 payments for its PM 27 violations.

Nor can SWBT rely on a claim that the straightforward application of the remedy plan to acknowledged PM 27 violations is somehow unjust in the circumstances. Even if that claim were justified, it would provide no legal basis for withholding Tier 1 payments under section 7.2 or any other provision of the remedy plan.

The plan anticipates that SWBT may feel that the plan results in unjust payments from time to time, and that CLECs may feel that the plan unjustly fails to compensate them for SWBT's conduct from time to time. However, the procedural cap provisions of the plan expressly limit such objections as a basis for relief from ordinary application of the plan's terms. Under section 7.3.1, SWBT may bring a proceeding to show "why, under the circumstances, it would be unjust to require it to pay liquidated damages in excess of the applicable threshold amount." That threshold amount is $3 million in one month to an individual CLEC. Only when damage payments to a CLEC exceed that amount, and only when SWBT has paid the balance into escrow, does section 7.3.1 allow SWBT to seek to excuse payments *in excess* of the $3 million threshold by demonstrating that such payments would be unjust under the circumstances. SWBT cannot invoke 7.3.1. on these facts, where damages remain well below the procedural threshold.

SWBT's action also is in breach of the procedural terms of Attachment 17, specifically section 10.4, which prohibits SWBT from withholding liquidated damages on grounds of CLEC fault without commencing an expedited dispute resolution proceeding

before the Commission. Under section 10.4, for amounts below the procedural cap (i.e., any amount up to $3 million per month), in order to withhold damages, SWBT must (a) commence an expedited dispute resolution proceeding and (b) assert one of the three permitted grounds for excusing a damages payment below the procedural cap amounts. SWBT's letter references one of those grounds -- CLEC fault[2] -- but SWBT has not commenced an expedited dispute resolution proceeding asserting that the PM 27 violations are the result of an AT&T act or omission in bad faith. While such a proceeding would clearly be unjustified (as discussed above), SWBT's withholding of damages payments without commencing such a proceeding represents a further breach of the interconnection agreement.

Indeed, section 7.2 – relied on by SWBT in this instance -- relieves SWBT of the obligation to pay liquidated damages only "**if the Commission finds** such noncompliance was the result" of CLEC bad faith. (Emphasis added). This requirement of a Commission finding underscores that SWBT may not withhold damages under section 7.2 without commencing a dispute resolution proceeding.

SWBT's breach of this requirement may not be cured by commencing an expedited dispute resolution proceeding at this late date. The requirement that SWBT commence such a proceeding in order to withhold a Tier 1 payment was to avoid just what has happened here -- delay in payment and the shifting of the burden of commencing litigation to the CLEC. Because SWBT neither timely paid PM 27 damages for its April-June performance nor timely commenced expedited dispute resolution

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[2] CLEC fault as a basis for eliminating SWBT's obligation to make remedy plan payments is identified in both section 7.1 (referring to acts or omissions in breach of the interconnection agreement or contrary to law) and section 7.2 (referring to acts or omissions in bad faith).

proceedings, it has waived any right to invoke section 7.2 to excuse its performance in those months.

As a final matter, AT&T feel strongly that any proposal by SWBT to make PM 27 diagnostic (which it has in effect done on a sua sponte basis by its witholding of damages) is a matter to be taken up at the next six-month review. CLEC proposals to add or reclassify measures have been regularly deferred to the next available six-month review, pursuant to Attachment 17.

However, AT&T feels compelled to respond that any consideration of the status of PM 27 would have to take account of PM 28, as well as PM 29. SWBT suggests that PM 29 (missed due date) captures the same information as PM 27 and provides a basis for making it diagnostic. The parties have previously debated, and the FCC has recognized, that a measure of percentage complete within an interval will not always displace the need for a measure of average interval. Regardless, SWBT's data shows that PM 28, rather than PM 29, is the more comprehensive of the current measurements that take the form of percentage complete within an interval. PM 28 captures percent within customer requested due date. PM 28 is capturing a higher volume of AT&T UNE-P no fieldwork orders than PM 29. SWBT excludes far fewer AT&T orders under PM 28 than it does under PM 27. PM 28 by definition should eliminate any "distortion" resulting from the timing of SWBT and CLEC orders or the intervals requested by SWBT retail customers and CLECs. Yet SWBT also has reported several recent parity violations for AT&T under PM 28 for UNE-P no fieldwork orders (Central/West -- February, March; Dallas/Fort Worth -- February, March, April, May; Houston -- February, March; South Texas -- February). However, despite the fact that PM 28 is more comprehensive and

captures more of AT&T's UNE-P no fieldwork orders, it remains diagnostic, and SWBT has been required to make no damages payments for parity violations it has reported, on a larger volume of orders than reported under PM 27.

Accordingly, any consideration of diagnostic status in the future for PM 27 would have to be accompanied by consideration of reclassifying PM 28 as subject to Tier 1/Tier 2 payments. However, consideration of either subject is a matter for the next six months review, not retroactive modification of the performance measures today, much less unilateral modification. AT&T suspects that SWBT would not favor an AT&T request that PM 28 be reclassified as Tier 1 High, retroactive to February, resulting in very substantial damages liability for the much higher AT&T volumes SWBT reports under PM 28, as compared to PM 27. SWBT's withholding of April-June damages is equally unjustified under the contract.

In closing, AT&T would note that SWBT's unilateral retroactive modification of the performance measure business rules is particularly incongruous given its publicly stated position that it does not even have to make changes to the performance measures that the Commission has ordered as a result of the six-month review, unless it agrees.[3] While AT&T does not agree with SWBT's interpretation of the operation and effect of the six-month review and Commission orders that result from that review, SWBT has absolutely no authority to make changes to the performance measures that the Commission has not ordered, unless the CLEC agrees.

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[3] See SWBT Motion for Rehearing or Clarification, Docket No. 20400, at pp. 3-4 (July 3, 2001); Reply of SWBT, Docket No. 20400, at p. 2 (July 13, 2001) ("Absent consent by SWBT to implement all of the directives arising out of this PM collaborative proceeding, the Commission cannot require implementation without mutual agreement of the parties or, with respect to new measures, unless and until an arbitration on the record subject to appellate rights is conducted.")

**REQUEST FOR COMMISSION ACTION**

SWBT has failed to make the Tier 1 damages payments to AT&T that were required for its PM 27 violations reported for the months of April, May, and June. All those payments now are overdue under the Interconnection Agreement, the April payment since mid-June.

Accordingly, AT&T requests that the Comission require that SWBT deliver the Tier 1 amounts payable under the plan for the April, May, and June parity violations reported under PM 27. Additionally, in accordance with section 10.2 of Attachment 17 of the Agreement, for each day after the due date that SWBT has failed to pay the required amount, SWBT should be required to pay interest to AT&T at the maximum rate permitted by law for a past due liquidated damages obligation. Finally, SWBT should be required on a going-forward basis to abide by the business rules of PM 27 and make payments for any violations in accordance with the provisions of the remedy plan unless and until PM 27 is changed as a result of the next six-month review.

Respectfully submitted,

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AT&T COMMUNICATIONS OF
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919 Congress Avenue, Suite 900
Austin, TX 78701-2444
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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served by hand delivery, electronic mail, and/or facsimile on all parties of record in this proceeding on the 27th day of August, 2001.

_____

Michelle Sloane Bourianoff

Exhibit 7

BEFORE THE
ILLINOIS COMMERCE COMMISSION

| | |
|---|---|
| IN THE MATTER OF: | ) |
| ILLINOIS BELL TELEPHONE COMPANY, AT&T COMMUNICATIONS OF ILLINOIS, INC., TCG ILLINOIS, TCG CHICAGO, TCG ST. LOUIS, CORECOMM, ILLINOIS, INC., WORLDCOM, INC., McLEOD USA TELECOMMUNICATIONS SERVICES, INC., XO ILLINOIS, INC., NORTHPOINT COMMUNICATIONS, INC., RHYTHMS NETCONNECTION and RHYTHMS LINKS, INC., SPRINT COMMUNICATIONS, L.P., FOCAL COMMUNICATIONS CORPORATION OF ILLINOIS, and GABRIEL COMMUNICATIONS OF ILLINOIS, INC. | ) |
| Petition for resolution of disputed issues pursuant to Condition (30) of the SBC/Ameritech merger order. | ) No. 01-0120 |

Chicago, Illinois
August 31, 2001

Met pursuant to notice at 10:00 a.m.

BEFORE:

MS. CLAUDIA SAINSOT and MS. LESLIE HAYNES,

Administrative Law Judges

APPEARANCES:

ruling came out but sometime before then.

I believe in -- I believe it was in '98.

BY MS. SAINSOT:

Q. Thank you.

On Page 24 of your direct testimony you stated that if Ameritech does not initiate an expedited procedure before the remedy payments are due, the pro CLEC presumption stands.

Could you maybe tell me what you think the pro CLEC presumption is?

Well, delete the word "maybe."

A. Could you just give me a line number there?

MS. NAUGHTON: 9 to 10.

MR. METROPOULOS: That would be the first full question and answer on Page 24.

JUDGE SAINSOT: Lines 9 through 10 I have on the hard copy.

THE WITNESS: I believe the point here is that if Ameritech does not initiate the procedure to investigate the remedy payment that the remedy payment is then paid.

There must be an initiation of the

procedure before the remedy is due or else the remedies must be paid.

BY JUDGE SAINSOT:

Q. Thank you.

Would you agree with me that benchmarks are a standard as to what's acceptable in the business community generally?

A. Are you speaking generally?

Q. Yes.

A. Depending on how you are using the term, I think there are many benchmarks that exist across various industries that people use to compare their performance to.

Benchmarks are used in many industries.

Q. Are you saying they're used in different ways?

A. Certainly. They certainly are.

Q. Would you agree with me that a law is a standard determined by society as to what's acceptable?

A. I'm not an attorney.

Q. On Page 28 of your rebuttal testimony, you

Exhibit 8

# PROJECT NO. 20400

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| **SECTION 271 COMPLIANCE MONITORING OF SOUTHWESTERN BELL TELEPHONE COMPANY OF TEXAS** | § § § § | **PUBLIC UTILITY COMMISSION OF TEXAS** |

## ORDER NO. 33

## APPROVING MODIFICATIONS TO PERFORMANCE REMEDY PLAN AND PERFORMANCE MEASUREMENTS

This Order, as issued by the Public Utility Commission of Texas (Commission), approves modifications to the Performance Remedy Plan (Plan) and Performance Measurements (Measurements) included in Attachment 17 to the Texas 271 Agreement (T2A) as recommended by Commission Staff or agreed to by the parties. The revised Measurements shall be designated as Version 2.0 and shall supercede Version 1.7. The revisions to both the Plan and the Measurements shall be incorporated by Southwestern Bell Telephone Company (SWBT) into Attachment 17 to the T2A and filed by June 15, 2001. Attachment 17, as revised by this Order, shall supercede the previous version of the document. The required changes are identified in the attached matrix.

Version 2.0 and any revisions to the Plan included in this Order shall become effective July 1, 2001.

### Ordering Paragraphs

1. SWBT shall file a revised Performance Remedy Plan and Version 2.0 of the Performance Measurements by June 15, 2001. The revised Plan and Performance Measurements shall contain all of the modifications contained in the matrix, including the modifications to the proposed measures attached to the matrix.

2. SWBT shall also file revised appendices to the Performance Remedy Plan within the same time frame.[1] The revised appendices shall reflect the Commission's changes to the Plan and to the Performance Measurements.

**SIGNED AT AUSTIN, TEXAS the _____ day of May, 2001.**

**PUBLIC UTILITY COMMISSION OF TEXAS**

**PAT WOOD, III, CHAIRMAN**

**BRETT A. PERLMAN, COMMISSIONER**

[1] There are two appendices in Attachment 17 to the T2A that are titled, "Measurements Subject to Per Occurrence Damages or Assessment with a Cap" and "Performance Measures Subject to Tier-1 and Tier-2 Damages Identified as High, Medium and Low."

Exhibit 9

**SWB**
**July 2, 2001**

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**SOUTHWESTERN BELL TELEPHONE COMPANY'S**
**MOTION FOR REHEARING AND CLARIFICATION**

**PROJECT NO. 20400**

| | | |
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| **SECTION 271 COMPLIANCE MONITORING OF SOUTHWESTERN BELL TELEPHONE COMPANY** | **§ § § §** | **PUBLIC UTILITY COMMISSION OF TEXAS** |

**SOUTHWESTERN BELL TELEPHONE COMPANY'S MOTION FOR REHEARING AND CLARIFICATION**

Southwestern Bell Telephone Company (SWBT) files this Motion for Rehearing and Clarification of the Order issued on June 1, 2001, relating to the second collaborative Six Month Review process for Performance Measurements (PMs).

## I. BACKGROUND

Project No. 20400 generally, and the Performance Measurements Six Month Review process specifically, is the product of exhaustive negotiations, tests, agreements and orders of the Commission that preceded its conclusion that SWBT complied with Section 271 of the federal Telecommunications Act of 1996 (FTA). The Commission and the parties to that process negotiated the Texas 271 Agreement (T2A), an interconnection agreement setting forth the terms by which any competitive local exchange carrier (CLEC) could provide local exchange service in Texas within SWBT's certificated territory. The entire T2A represents a series of "gives and takes" by all parties participating in the 271 Collaborative Process, culminating in part with a series of obligations imposed on SWBT together with limitations on the extent of those obligations.

SWBT's Performance Remedy Plan (which is Attachment 17 to the T2A) establishes the process known as the Six Month Review for Performance Measurements. As recognized by Section 6.5 of Attachment 17, as well as by the

Commission in the Open Meeting on December 13, 2000, prior to the most recent review, one of the goals of the Six Month Review is to reduce the number of PMs.[1] The Performance Remedy Plan does, however, recognize that changes to existing measurements may occur and that new measurements may be added. The plan specifically sets forth how such changes can occur or additional measurements can be added. On this, the T2A is very clear:

> Any changes to existing performance measures and this remedy plan shall be by mutual agreement of the parties and, if necessary, with respect to new measures and their appropriate classification, by arbitration.[2]

SWBT is committed to the Six Month Review Process as it has developed and as it was defined in the T2A and believes that the collaborative tone and substance are effective, appropriate, and productive. The first Six Month Review and its "gives and takes" lead to results and PMs to which SWBT ultimately agreed, as they were interpreted at the time. This most recent review, however has resulted in a few changes to the PMs which are regrettably unacceptable to SWBT. These changes, in SWBT's opinion, provide no benefit to CLECs or to the public, and will only lead to disputes as to their application in the future. SWBT's specific concerns include:

- As explained in greater detail below, SWBT opposes being required to implement new measurements that would assess to its performance under the interstate and intrastate tariffs for the provisioning of retail Special Access services. Special Access services are provided only as a consequence of and in accordance with tariffs; they are not part of the T2A and thus cannot legally be subject to the Performance Remedy Plan.
- The implementation of PM 1.2 as defined in this second Six Month Review is unacceptable because it cannot implemented as directed. SWBT had offered its interpretation of how to report data for PM 1.2, and that is the only way that SWBT is aware that the intent of PM 1.2 can be accomplished.

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[1] *See* the discussion of the Commission, Open Meeting, December 13, 2000, pp. 87-91.

[2] Attachment 17: Performance Remedy Plan – TX, Section 6.4 (emphasis added).

- Finally, the order regarding PM 13 is confusing as to whether it requires punitive penalties, for which there is no basis. SWBT requests clarification as to the intent of the Commission with regard to PM 13.

As a result, SWBT respectfully requests the Commission to reconsider and clarify its order relative to each of these three matters in light of SWBT's arguments below. Absent modifications on rehearing, SWBT will not be able to mutually agree to these PMs or their implementation.[3] According to the criteria set forth in Section 6.4 of Attachment 17, SWBT will seek to resolve any disputes concerning any potential Special Access measures and PMs 1.2 and 13 through the remedies set forth in the T2A.

## II. REQUEST FOR RECONSIDERATION

### A. THERE IS NO BASIS UNDER THE T2A'S PERFORMANCE REMEDY PLAN TO ORDER THE IMPLEMENTATION OF SPECIAL ACCESS PMs.

In its June 1, 2001, Order, the Commission stated that "to the extent that a CLEC orders special access in lieu of UNEs, SWBT's performance shall be measured as another level of disaggregation in all UNE measures."[4] At the Open Meeting on May 24, 2001, there was discussion regarding whether Special Access performance measures were necessary. Former Chairman Wood concluded the discussion with a direction to Staff to "see if there's really a disagreement"[5] about whether the CLECs must order certain services as UNEs or whether they must use the Special Access Tariffs.

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[3] In any event, the Performance Remedy Plan is a form of liquidated damages to which both parties must voluntarily agree in order for the remedy to be lawful and binding, as was done in the T2A. SWBT does not agree to liquidated damages for these identified PMs and any attempt to compel a negotiated agreement would constitute a violation of SWBT's constitutional right to due process.

[4] Order No. 33, June 1, 2001, p. 88.

[5] Open Meeting Transcript, Thursday, May 24, 2001, p. 28. The discussion regarding Special Access is contained within pp. 19-28. A review of that transcript demonstrates a significant amount of uncertainty.

In preparing for the workshop to address this issue, SWBT investigated whether CLECs have been forced to order out of either the interstate or intrastate tariffs regarding Special Access, and SWBT has been unable to locate a single instance wherein a CLEC was forced to order out of the Special Access Tariffs. Further, the CLECs have brought forth no specific evidence. They merely make generalized allegations, which are not supported by any specific facts. Under these circumstances there is no record that would support instituting any special access measurements, and thus SWBT cannot agree to do so. In the workshop held just last Friday, June 29, 2001, SWBT asked for specific examples and none were provided by the CLECs. Furthermore, in the workshop last Friday, it appeared that this issue had gone well beyond the very limited instruction of the Commission on the application of Special Access. SWBT is now required to comment on WorldCom's far more global proposal.[6] We believe the Commissioners rejected such a global approach at the Open Meeting of May 24, 2001.

SWBT and other carriers have provided Special Access services for over twenty years, since divestiture. Competition in the special access arena is alive and well, and the service is classified as non-basic under Public Utility Regulatory Act (PURA) in recognition of options which customers have for Special Access. Indeed, a wealth of providers has resulted in a keenly robust and competitive market. Because multiple sources for these services exist, there is no need to establish measurements assessing SWBT's performance in providing such mature services, particularly not the kind of

[6] Since the workshop on Special Access took place this past Friday, June 29, 2001, SWBT may supplement this motion after review of the transcript.

measurements which have been previously developed for the provision of wholesale UNEs (e.g., DS1 loops) utilized to provide local exchange service.

Given this circumstance, there also is no reason for the Commission to exceed its limited jurisdiction with respect to these retail Special Access services. Research discloses that approximately 94% of Special Access services in Texas are ordered from the interstate tariff (FCC Tariff 73) over which the FCC has jurisdiction. Moreover, even with respect to SWBT's intrastate Special Access Tariff, the tariff terms and conditions alone control the provision of access and this Commission cannot unilaterally change those tariff terms and conditions. Further, those tariffs contain their own performance penalties in the tariff or by contract with SWBT. Such potential double recovery is prohibited by the Performance Remedy Plan itself, which says that it is the exclusive contract remedy. Significantly, the Remedy Plan measures SWBT's performance under the T2A. The T2A does not include the provision of Special Access services. Accordingly, there is no permissible way to unilaterally extend the coverage of the interconnection agreements to services which are clearly interstate services.

It is of no consequence that some carriers may make a business decision to utilize retail special access services for providing local exchange service, instead of wholesale UNEs. The purpose of this Commission having originally established PMs in this docket was to ensure SWBT's FTA Section 271 compliance with the 14-point checklist after SBC Communications Inc. became authorized to provide long distance service in Texas. The checklist does not address retail Special Access services, and FCC has three times concluded that performance relative to provisioning of Special